# MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY RESPONSIVENESS SUMMARY TO PUBLIC COMMENTS RECEIVED ON THE MONTANA NATURAL RESOURCES AND CONSERVATION PARTIAL CONSENT DECREE AND THE SWANK ENTERPRISES PARTIAL CONSENT DECREE

November 22, 2005

In 2004, the Montana Department of Environmental Quality (DEQ) filed a lawsuit against a number of defendants to require the environmental cleanup of three neighboring and interrelated state superfund facilities, the Kalispell Pole and Timber, Reliance Refinery, and Yale Oil Corporation sites. DEQ entered into a Partial Consent Decree (CD) with one of those defendants, the Montana Department of Natural Resources and Conservation (DNRC), filed with the First Judicial District Court, Lewis & Clark County (Court) on June 16, 2005. DEQ solicited public comment on the document and the public comment period on the CD ran from June 16, 2005 to July 16, 2005 at midnight. DEQ published notice of the comment period in the Daily Interlake and the Independent Record, posted the document on its website, and provided specific notice to the Flathead County Commissioners, the Kalispell Mayor, and the Kalispell City Council. DEQ entered into a CD with Swank Enterprises (Swank) that was filed with the Court on October 3, 2005. DEQ solicited public comment on the document and the public comment period on this CD ran from October 5, 2005 to November 3, 2005 at midnight. DEQ published notice of the comment period in the Daily Interlake and the Independent Record, posted the document on its website, and provided specific notice to the Flathead County Commissioners, the Kalispell Mayor, and the Kalispell City Council.

DEQ has carefully considered all comments received. Some changes were necessary to the DNRC CD as a result of public comment; however, these changes are considered minor and do not require another public comment period. In this document, DEQ responds to the comments received and indicates its intention to submit the CDs to the Court for approval. Attached to this document is a list of the records in the administrative record upon which DEQ based its decision. These documents will be lodged with the Court for its review.

## I. Introduction to Superfund Law

DEQ is the agency charged with administration and enforcement of Montana's state superfund law, the Montana Comprehensive Environmental Cleanup and Responsibility Act (CECRA), §§ 75-10-701 et. seq., MCA. CECRA is based on the federal superfund law known as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 USC 9601 et seq.

CECRA imposes strict, joint and several liability for remediation of a CECRA facility on certain persons, including:

a. A person who owns or operates a facility where a hazardous or deleterious substance was disposed of (i.e., a current owner or operator);

b. A person who at the time of disposal of a hazardous or deleterious substance owned or operated a facility where the hazardous or deleterious substance was disposed of (i.e., a past owner or operator);
c. A person who generated, possessed, or was otherwise responsible for a hazardous or deleterious substance and arranged for disposal or treatment of the substance or arranged for transport for disposal or treatment (i.e., a generator); and
d. A person who accepts or has accepted a hazardous or deleterious substance for transport to a disposal or treatment facility (i.e., a transporter).

Section 75-10-715, MCA. CECRA also provides for defenses to and exclusions from liability. In addition, CECRA does not define a "facility" with respect to property ownership or boundaries but rather defines a facility as "any site or area where a hazardous or deleterious substance has been deposited, stored, disposed of, placed, or otherwise come to be located." Section 75-10-701(4)(a)(ii), MCA.

One of the purposes of CECRA is to "encourage private parties to clean up sites." Section 75-10-706(1)(b), MCA. To that end, DEQ is encouraged to "expedite effective remedial actions and minimize litigation" by entering into settlement agreements with liable persons. Section 75-10-723, MCA. DEQ is given broad discretion to enter into settlement, guided by the principles that any settlement be "practicable and in the public interest." Id. Such settlement may contain whatever terms and conditions DEQ, "in its discretion determines to be appropriate." Id.

## II. Background on Facilities and Liable Persons

There are three facilities that are the subject of the current litigation. These facilities are very complex due to the nature of the contamination and the fact that plumes of contamination have commingled together. (Exhibit A, Page 35)

Kalispell Pole and Timber (KPT)

The KPT facility is upgradient with respect to groundwater flow of the other two facilities. (Exhibit L, Figure 1-2) DEQ believes it is contributing the most environmentally damaging contamination. The Kalispell Pole and Timber Company (KPT Company) operated a wood-treating operation from approximately 1944 to 1990 on property KPT Company owned as well as property it leased from the BNSF Railway Company (BNSF)[1]. (Exhibit C, Pages 3 and 5, Exhibit D, Pages 5 and 15) Beginning in 1971, the KPT Company also leased property from DNRC for the purpose of pole storage. (Exhibit C, Page 4) The KPT Company used pentachlorophenol (PCP) mixed in a petroleum-based carrier solution to treat the wood (Exhibit D, Page 16), which resulted in contamination of soils and groundwater with PCP, petroleum, and dioxins/furans. (Exhibit D, Page 21, Exhibit E, Page 11] When the KPT Company dissolved in 1990, it sold its real property to Montana Mokko and Swank. (Exhibits F and G) BNSF continued to lease its real property to Klingler Lumber Company (Exhibit H, Pages 3-4) and Montana Mokko has continued to use the property, constructing a finger-joining facility and

[1] When referring to BNSF, it includes the predecessor companies of BNSF. When referring to DNRC, it includes the predecessor agency of DNRC, the Montana Department of State Lands. When referring to DEQ, it includes the predecessor agency of DEQ, the Montana Department of Health and Environmental Sciences. When referring to Exxon Mobil, it includes the predecessor companies of Exxon.

sawmill on BNSF property. (Exhibit SS) In 1992, Klingler Lumber Company purchased some property at the facility from Swank. (Exhibit H, Attached Deed from Swank to Klingler)

The liable persons at this facility currently named in the litigation include: the KPT Company, BNSF, DNRC, Klingler Lumber Company, Montana Mokko, and Swank.

Reliance Refinery Company

The Reliance Refinery facility is located immediately east of the KPT facility. (Exhibit L, Figure 1-2) The property was used as a petroleum refinery and cracking plant from the 1920s through about 1958. (Exhibit A, Page 2) DNRC took title to the property on December 26, 1933 through a Sheriff's Deed Under Foreclosure after the Reliance Refining Company that owned the property quit paying its taxes. (Exhibit J) DNRC then leased the property to Boris Aronow dba the Unity Petroleum Company until 1969. (Exhibit A, Page 2) Refinery operations resulted in contamination of soils and groundwater with petroleum and lead contamination has also been found in soils. (Exhibit A, Pages ES-2 and ES-3) The DNRC property was leased to the KPT Company from 1969 to 1990 (when the KPT Company dissolved), during which time it was used for storage of poles. (Exhibit C, Page 4) BNSF owns a spur line that runs through the facility. (Exhibit T)

The liable persons at this facility currently named in the litigation include: BNSF, DNRC, and Swank.

Yale Oil Corporation Facility

The Yale facility is located south/southeast of the Reliance Refinery facility. (Exhibit L, Figure 1-2) The property was used by Exxon Mobil Corporation as a refinery beginning in the 1930s and then beginning in the 1940s, it was used by T.J. Landry Oil Company, Inc. as a bulk fuel storage facility until about 1978. (Exhibit K, Page 4) The operations resulted in contamination of soils and groundwater with petroleum. (Exhibit K, Pages 11-34)

The liable person at this facility currently named in the litigation includes Exxon Mobil Corporation.

Relationship of Three Facilities

As described above, each person is subject to strict, joint and several liability for a facility which includes any area where contamination from that facility has come to be located. For example, even though BNSF never owned or operated the Yale facility, CECRA holds BNSF responsible for cleaning up the groundwater at Yale since contamination in that groundwater came, in whole or in part, from BNSF upgradient facilities for which BNSF is a liable party. (See Exhibit B, Page 6, which explains that businesses located on the Reliance and Yale facilities did not use PCP in their operations and Exhibit L, Page 6-1, which states that the PCP plume extends to GWY-14, a monitoring well on the Yale facility.)

## III. The Consent Decree Process

A Consent Decree provides a mechanism for DEQ to settle with a liable person and provide contribution protection from other liable parties to that person. Section 75-10-719, MCA,

provides that a person who has resolved his liability under CECRA is not liable for claims of contribution regarding matters addressed in the settlement.

The process for reaching agreement under a Consent Decree requires that DEQ gather information and conduct fact finding to assist it in determining reasonable terms of settlement. DEQ enters into negotiations with a liable person to attempt to reach settlement. If the terms of a Consent Decree are reached and the document is executed between the parties, DEQ then lodges it with the Court and requests public comment on the document. Public comment is an important part of the process and is required under § 75-10-713(1)(a), MCA. In fact, DEQ may modify or withdraw its consent to the Consent Decree if comments received disclose facts or considerations that indicate that the Consent Decree is inappropriate, improper or inadequate. See Section XX of the DNRC and Swank CDs. If DEQ believes the settlement is consistent with CECRA's goals and is reasonable and fair, DEQ then asks the Court to approve it.

### A. Consistency with CECRA's goals

As discussed, a Consent Decree must further certain legislative goals as set forth in CECRA. The primary goal of CECRA is to ensure protection of public health, safety, welfare and the environment. Section 75-10-706, MCA. The two major policies underlying superfund laws in general and CECRA in particular are prompt and effective cleanup and holding persons designated as liable persons under § 75-10-715, MCA, responsible for their approximate share of the hazard and consequent cleanup costs. See U.S. v. Charter Intl. Oil Co., 83 F.3d 510, 522 (1st Cir. 1996) (citing Cannons Engr., 899 F.2d at 89-91; U.S. v. Rohm & Haas Co., 721 F. Supp. 666, 680 (D.N.J. 1989)). Legislative intent underlying superfund liability was to expedite an effective response while minimizing litigation. U.S. v. Atlas Minerals & Chems., Inc., 851 F. Supp. 639, 655 (E.D. Penn. 1994) (citing Cannons Engr., 899 F.2d at 90-91). The primary goal of CERCLA and other superfund laws is to encourage early settlement. U.S. v. Montrose Chem. Corp. of Cal., 793 F. Supp. 237, 240 (C.D. Cal. 1992). Consent decrees are the tool through which such early settlement is achieved.

Superfund law was designed to encourage settlement and provide liable persons a measure of finality in return for their willingness to settle. Defendants in Superfund cases generally settle for substantially less--indeed, often for far less given the inherent problems of proof in these cases--than the asserted damages. This may lead non-settling parties to bear a share of the liability disproportionate to their comparative fault. However, this disproportionate liability is a recognized technique that not only promotes early settlements and deters litigation for litigation's sake, but also is an integral part of the statutory plan of superfund law. In this case, settlement with DNRC and Swank furthers CECRA's goals and may encourage other defendants to consider early settlement.

### B. Reasonableness

Based on Cannons, DEQ looks to three factors to determine if a Consent Decree is reasonable. The first factor that is considered is the decree's likely effectiveness for ensuring protection of human health and the environment. This is of cardinal importance. Except in cases which involve only recoupment of cleanup costs already spent or a settlement based on a percentage of

future remediation and not a sum certain, the reasonableness of the consent decree, for this purpose, will typically be a question of technical adequacy, primarily concerned with the probable effectiveness of proposed remedial responses.

A second important facet of reasonableness will depend upon whether the settlement satisfactorily compensates the public for the actual (and anticipated) costs of remedial and response measures. Like the question of technical adequacy, this aspect of settlement can be enormously complex. The actual cost of remedial measures is frequently uncertain at the time a consent decree is proposed. In cases where a settlement is based on a certain percentage of future costs, this uncertainty is not important as the settling party has assumed the risk of an overly expensive remediation. Where the settlement's bottom line is made definite by a sum certain to be paid by the settling party, the proportion of settlement dollars to total needed dollars is often difficult or impossible to determine with mathematical precision. In such instances DEQ will use its expertise and best efforts together with the available information to estimate the likely remediation and its costs. In the case at hand, DEQ has substantial amounts of information regarding the conduct and basis of liability for each party. It is true that the nature and extent of contamination has not been fully defined at these facilities; however, that is the reason DEQ elected to settle with DNRC and Swank for a proportion of liability rather than a sum certain.

The third reasonableness factor relates to the relative strength of the DEQ's case against the settling party. Where DEQ's case is strong and solid, it will require more in settlement. Conversely, where DEQ's case is weaker or the settling party has a strong defense to liability, or the outcome is problematic (it may take time and money to collect damages or to implement private remedial measures through litigatory success), a reasonable settlement will ordinarily mirror such factors. In a nutshell, the reasonableness of a proposed settlement must take into account foreseeable risks of loss. As discussed below, DEQ considered DNRC's and Swank's defenses when evaluating the reasonableness of settlement.

### C. Fairness

Fairness of Consent Decrees includes concepts of both procedural fairness and substantive fairness. Procedural fairness speaks to the negotiation process that leads to the Consent Decree and to the parties' candor, openness, and bargaining balance. DEQ will ensure procedural fairness by conducting its negotiations forthrightly and in good faith. Substantive fairness requires that a settling party roughly bear the cost of the harm for which it is legally responsible. To ensure substantive fairness, settlement terms should be based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each liable person has done. DEQ will generally rely upon the application of liability factors provided under §75-10-750, MCA, to the settling party and the known facts at the time of settlement to ensure substantive fairness of any Consent Decree. Individual site or party specific facts and the need to be faithful to the goals of CECRA will also be considered by DEQ to ensure substantive fairness. DEQ's evaluation of the CECRA factors is described below.

## IV. Adoption of the Subject Consent Decrees

Consideration of Allocation Factors

Section 75-10-750, MCA, lists the factors that DEQ considers in determining a fair and reasonable allocation of liability at a CECRA facility. They include:

1. the extent to which the person caused the release of the hazardous or deleterious substance;
2. the extent to which the person's contribution to the release of a hazardous or deleterious substance can be distinguished;
3. the amount or volume of hazardous or deleterious substance and the amount contributed by the person;
4. the relative hazard of the hazardous or deleterious substance contributed by the person, including volatility, carcinogenicity, mobility, persistence, reactivity, and toxicity;
5. the degree of past and present cooperation by the person with the government to prevent harm to the public health, safety, or welfare and the environment, including participation in remedial actions occurring concurrently with the allocation process and compliance and cooperation with discovery pursuant to [the Controlled Allocation of Liability Act];
6. what the person knew or should have known of the hazardous nature of the substance, the risk associated with that substance, and proper waste disposal practices;
7. the circumstances of the property acquisition, including the documented price paid and discounts granted;
8. the person's knowledge of or acquiescence to waste generation, storage, handling, treatment, or disposal;
9. the length of time of ownership, operation, generation, or transportation;
10. any violations of or noncompliance with health and environmental regulations, including permit violations or violations relating to public notification;
11. the degree to which a person providing publicly owned landfill or sewer and water systems had or has a reasonable ability to control disposed materials and the person's degree of care in maintaining those services;
12. the person's financial or economic benefit from (a) ownership or operation of the facility; (b) the generation, transportation, or disposal of the hazardous or deleterious substance; and (c) cleanup of the facility;
13. whether the person exercised due diligence in generating, transporting, or disposing of hazardous or deleterious substances and the person's control over those activities; and
14. other equitable factors that are appropriate.

DEQ focuses on evaluating these factors and conducts a comparative fault analysis to determine a reasonable range of liability for the settling defendant. As explained above, the parties then negotiate not only the liability assessment but also the other terms of the Consent Decree.

Because a final remedy has not yet been selected at the facilities, DEQ cannot say how much the final cleanup costs will be. However, DEQ has a significant amount of information regarding the operational history of each facility and the basis for each defendant's liability. For that reason, DEQ determined it was fair and reasonable to assess liability based on a percentage basis.

DNRC Consent Decree

DNRC approached DEQ about settling DNRC's liability in the fall of 2004. In February 2005, DNRC sent a proposed Consent Decree to DEQ. (Exhibit M) As part of its evaluation of DNRC's liability, DEQ considered all the factors contained in § 75-10-750, MCA, and conducted a comparative fault analysis. At least four versions of the Consent Decree were exchanged and negotiated between the parties. (Exhibits M, N, O and P) DNRC hired a consultant to assess its liability and the consultant indicated his belief that 12.63% was a fair allocation. (Exhibit Q) DEQ relied on its technical staff and scientists to assess the technical information and relied on its attorneys to assess strengths and weaknesses of its litigation position and conducted arms-length negotiations with DNRC. The following is a general description of how DEQ views each factor as applicable to DNRC.

1. The extent to which the person caused the release of the hazardous or deleterious substance: Based on current information, DNRC did not actively cause a release, although passive migration (such as leaching) of contamination has likely occurred during DNRC's ownership. DNRC leased its property to companies that did cause releases. (Exhibit A, Pages ES-2 and ES-3)
2. the extent to which the person's contribution to the release of a hazardous or deleterious substance can be distinguished: It is not believed that DNRC contributed to the active releases at the facilities. However, DNRC's lessees contributed petroleum contamination. (Exhibit A, Pages ES-2 and ES-3) Based on DEQ's experience, the PCP and dioxin/furan contamination from the KPT Company operations, centered on BNSF property, will drive the cost of the cleanup.
3. the amount or volume of hazardous or deleterious substance and the amount contributed by the person: It is not believed that DNRC contributed any volume of contamination.
4. the relative hazard of the hazardous or deleterious substance contributed by the person, including volatility, carcinogenicity, mobility, persistence, reactivity, and toxicity: DNRC's property is a source of petroleum and lead contamination. (Exhibit A, Pages ES-2 and ES-3) However, the more hazardous and expensive contaminants to cleanup at these facilities are PCP and dioxin/furans. The available information does not indicate that DNRC's property is a major source of these contaminants. The most heavily contaminated PCP source area is on BNSF property. (See Exhibit B, Page 6 "Investigations confirm that the vast majority of PCP-contaminated soils are in the area of the KP&T treating process area.…"; see also Exhibit B, Page 7 "The soil and ground-water quality data clearly demonstrate that KP&T operations are the sole source of PCP to soil and ground water.")
5. the degree of past and present cooperation by the person with the government to prevent harm to the public health, safety, or welfare and the environment, including participation in remedial actions occurring concurrently with the allocation process

and compliance and cooperation with discovery pursuant to [the Controlled Allocation of Liability Act]: DNRC has been very cooperative. DNRC allowed EPA to fence its property once it was determined that there were sludge pits posing an imminent threat to human health. (Exhibit R) DNRC then agreed to assume maintenance of the fence. (Exhibit S) DNRC also removed the property from lease availability, at a financial loss to DNRC, to prevent lessees from operating on a known contaminated property. (Exhibits U and TT) DNRC proactively sought grant funding from the legislature to undertake investigation on its property and on property owned by third parties. (Exhibit V) DNRC was instrumental in passing SB489 to provide funding to conduct a comprehensive remedial investigation/feasibility study (RI/FS) at all three facilities. DNRC also sought out early settlement of this litigation with DEQ.

6. what the person knew or should have known of the hazardous nature of the substance, the risk associated with that substance, and proper waste disposal practices: At the time that DNRC took title to the property in 1933, the property had already been operated as a refinery. (Exhibit A, Page 2) DNRC continued to lease to refinery operators until 1958, after which it leased the property to the KPT Company for the storage of poles. (Exhibit A, Page 2 and Exhibit C, Page 4)
7. the circumstances of the property acquisition, including the documented price paid and discounts granted: DNRC acquired the property through back taxes at a sheriff's sale. (Exhibit J) It did not actively or voluntarily seek out ownership of the property.
8. the person's knowledge of or acquiescence to waste generation, storage, handling, treatment, or disposal: It is believed that DNRC had little knowledge of the refinery operations as DNRC was an "absentee landowner." However, DNRC leased its property to a refinery so arguably it acquiesced to the activities, including disposal of refinery waste, that occurred on the property.
9. the length of time of ownership, operation, generation, or transportation: DNRC took title to the property in 1933 and has owned it since that time. (Exhibit J) DNRC has not operated the facilities nor generated or transported any waste (other than investigation-derived waste and free product removed from the groundwater which has been disposed of properly).
10. any violations of or noncompliance with health and environmental regulations, including permit violations or violations relating to public notification: DEQ is unaware of any violations by DNRC.
11. the degree to which a person providing publicly owned landfill or sewer and water systems had or has a reasonable ability to control disposed materials and the person's degree of care in maintaining those services: This factor is not applicable here.
12. the person's financial or economic benefit from (a) ownership or operation of the facility; (b) the generation, transportation, or disposal of the hazardous or deleterious substance; and (c) cleanup of the facility: DNRC leased the property and received rents from various refinery operators and from the KPT Company. (Exhibits A and C) DNRC did not receive any benefit from the disposal of waste. DNRC will benefit from the cleanup of the facilities in that its property value will likely increase and the property will again be available for lease.
13. whether the person exercised due diligence in generating, transporting, or disposing of hazardous or deleterious substances and the person's control over those activities:

While DNRC was not involved in the operations at the facility, the disposal practices of the refinery lessees were likely typical of the time period.

14. other equitable factors that are appropriate: DNRC raised a number of defenses to liability in this case which DEQ considered, including DNRC's unified executive agency theory and the fact that DNRC became an owner of the property involuntarily and was then required by state law to lease the property for its highest and best use. DNRC also argued that it did not cause the releases of hazardous or deleterious substances and thus had a defense under CECRA. Finally, DNRC recognized that it had liability for the Reliance facility but argued it should not be held liable for cleanup at the KPT or Yale facilities. In fact, in the first draft Consent Decree it submitted to DEQ, DNRC only proposed accepting a percentage of liability for cleanup of the Reliance facility. (Exhibit M)

DEQ applied these factors to the facilities and DNRC's situation and determined a target allocation for DNRC's liability for all facilities to be 24 to 30%. As an initial assessment of DNRC's target liability, DEQ examined the number of liable person categories (owner, operator, arranger, or generator) and the number of facilities under which DNRC was liable under CECRA and compared this to the same analysis for the other defendants. Based on this, DNRC's initial allocation was approximately 6%. While the DNRC property was not seen as a major source of the most toxic contaminants, it is a large percentage of the overall cleanup area and based primarily on that DNRC's target allocation was doubled to 12%. Furthermore, this target of 12% was doubled again to 24% primarily due to DNRC's long-term ownership of the Reliance facility. An additional 6% (an amount equal to DNRC's initial allocation) for a total of 30% was targeted to DNRC based on its acquiesence to the refinery operations and disposal practices that took place on its property. DEQ did not believe DNRC's defenses were strong and estimated they only had a 0 to 20 percent chance of success, which resulted in a 0 to 6% reduction in the DNRC target allocation, which left that target as 24 to 30%.

Swank Consent Decree

Swank approached DEQ about settling Swank's liability in the summer of 2005 and a number of draft Consent Decrees were exchanged between the parties. As part of its evaluation of Swank's liability, DEQ considered all the factors contained in § 75-10-750, MCA, and conducted a comparative fault analysis. DEQ relied on its engineers and scientists to assess the technical information and relied on its attorneys to assess strengths and weaknesses of its litigation position and conducted arms-length negotiations with Swank. The following is a general description of how DEQ views each factor as applicable to Swank.

1. the extent to which the person caused the release of the hazardous or deleterious substance: Swank purchased its property in 1990 from the KPT Company. (Exhibit G) DEQ has field notes from 1991 and 1992 that indicate that barrels potentially containing petroleum-based substances were on the property. (Exhibit W) There is also sampling data on Swank's property indicating the presence of petroleum contamination. (Exhibit A, Page 26)
2. the extent to which the person's contribution to the release of a hazardous or deleterious substance can be distinguished: Swank's property has confirmed petroleum contamination. (Exhibit A, Page 26) However, based on DEQ's

experience, the PCP and dioxin/furan contamination for KPT Company operations, centered on BNSF property, will drive the cost of cleanup.

3. the amount or volume of hazardous or deleterious substance and the amount contributed by the person: Based on current information, if Swank contributed any volumes or amounts from the barrels on its property, the contamination would be petroleum and the contribution minimal.
4. the relative hazard of the hazardous or deleterious substance contributed by the person, including volatility, carcinogenicity, mobility, persistence, reactivity, and toxicity: Swank's property is a source of petroleum contamination. (Exhibit A, Page 26) However, the more hazardous and expensive contaminants to cleanup at these facilities are PCP and dioxin/furans. It is not believed that Swank's property is a source of these contaminants. The most heavily contaminated PCP source area is on BNSF property. (Exhibit B, Page 6 "Investigations confirm that the vast majority of PCP-contaminated soils are in the area of the KP&T treating process area.…"; see also Exhibit B, Page 7 "The soil and ground-water quality data clearly demonstrate that KP&T operations are the sole source of PCP to soil and ground water.")
5. the degree of past and present cooperation by the person with the government to prevent harm to the public health, safety, or welfare and the environment, including participation in remedial actions occurring concurrently with the allocation process and compliance and cooperation with discovery pursuant to [the Controlled Allocation of Liability Act: Swank did not take any actions to address the facilities despite DEQ's request to do so. Historically DEQ has not viewed Swank as a cooperative party. However, Swank's willingness to settle its liability in this case without protracted litigation indicates present cooperation.
6. what the person knew or should have known of the hazardous nature of the substance, the risk associated with that substance, and proper waste disposal practices: Swank is not the entity that disposed of most of the hazardous or deleterious substance at the facilities. However, DEQ believes it is reasonable to assume Swank had, or should have had, at least a requisite knowledge of the hazardous substances on the property it was acquiring as it purchased the property from a wood-treating company.
7. the circumstances of the property acquisition, including the documented price paid and discounts granted: In 1990, the KPT Company sold Tracts 19, 19A, 19B, 30Z, and 30I to Swank for $10,000. (Exhibit G) Based on the current assessed value of the property, DEQ believes Swank purchased this property at a discount from a company going out of business. In 1992, Swank sold some of the parcels to Klingler Lumber Company. (Exhibit H)
8. the person's knowledge of or acquiescence to waste generation, storage, handling, treatment, or disposal: The KPT Company Board of Directors' minutes indicate that environmental reports were provided to Swank prior to the date of purchase. (Exhibit X) In addition, Swank purchased the property from a wood-treating company. (Exhibit G) Therefore, actual or constructive knowledge of waste disposal may be imputed to Swank.
9. the length of time of ownership, operation, generation, or transportation: Swank owned the property on the KPT facility from 1990 to 1992 and has owned the property at the Reliance facility since 1990. (Exhibits G and H)

10. any violations of or noncompliance with health and environmental regulations, including permit violations or violations relating to public notification: DEQ is unaware of any violations by Swank.
11. the degree to which a person providing publicly owned landfill or sewer and water systems had or has a reasonable ability to control disposed materials and the person's degree of care in maintaining those services: This factor does not apply to Swank.
12. the person's financial or economic benefit from (i) ownership or operation of the facility; (ii) the generation, transportation, or disposal of the hazardous or deleterious substance; and (iii) cleanup of the facility: Swank received financial and economic benefit from ownership and operation of the facility as the property provides a storage location to support Swank's operations. Swank benefited from the disposal of hazardous or deleterious substances; because of their presence on the real property, Swank was able to purchase a prime piece of real estate for $10,000. Finally, because Swank owns real property at the facility, it is clear that Swank will benefit from cleanup of the facility.
13. whether the person exercised due diligence in generating, transporting, or disposing of hazardous or deleterious substance and the person's control over those activities: As outlined above, it is questionable whether Swank exercised due diligence in dealing with known contamination on property it owns.
14. other equitable factors that are appropriate. Swank raised a number of defenses to liability, including that it did not cause or contribute to the release, and thus had a defense under CECRA.

DEQ applied these factors to the facilities and Swank's situation and determined a target allocation for Swank's liability for all facilities to be 1.5%. As an initial assessment of Swank's target liability, DEQ examined the number of liable person categories (owner, operator, arranger, or generator) and the number of facilities under which Swank was liable under CECRA and compared this to the same analysis for the other defendants. Based on this, Swank initial target allocation was approximately 12%. However, based on the fact that the contribution from Swank was likely small in quantity and limited to petroleum, this amount was halved to approximately 6%. Swank's relatively brief ownership of the property coupled with the lack of significant polluting activities reduced its target allocation to 3%. Finally, DEQ did not believe Swank's defenses to liability would ultimately be successful, but they would require DEQ to incur substantial costs to disprove them. These costs are better put to remediation of the facility particularly where, as in this case, the defendant is not likely to be found responsible for a large portion of the liability. In that light, DEQ reduced its target allocation for Swank to 1.5%.

## V. Responses to Public Comment

BNSF submitted briefs in opposition to both the DNRC and Swank CDs and also submitted those briefs to DEQ as public comment. No other public comments were received by DEQ on either document. For brevity, DEQ consolidated the comments and paraphrased where appropriate. Because BNSF's comments on both CDs were very similar, DEQ combined its responses to comments where possible.

Comment 1: BNSF believes that DNRC's responsibility for cleanup of the three properties is far greater. (Page 2 of DNRC opposition brief)

Response: DEQ carefully analyzed the factors found in § 75-10-750, MCA, as described above and applied a comparative fault analysis. After considering all information and balancing all the factors, DEQ believes that 27.5% is a fair and reasonable allocation to DNRC and that this settlement is consistent with CECRA's goals. Further explanation of the basis for DEQ's determinations is found throughout this responsiveness summary.

Comment 2: The CD does not require DNRC to reimburse BNSF for any of its past or future costs for investigation and cleanup even though DEQ alleges that activities by DNRC's tenants on DNRC's property have contaminated soil and groundwater on BNSF's property and the soils at Reliance were not contaminated by BNSF or BNSF's tenant. Also, the costs incurred by BNSF directly benefit DNRC by delineating the nature and extent of contaminants in the soil and groundwater on DNRC's property and then removing those contaminants. The Swank CD similarly does not require Swank to reimburse BNSF for any of its past or future costs. (Pages 2, 7, 8, and 12 of DNRC opposition brief; Page 5 of Swank opposition brief)

Response: Paragraph 20 of the DNRC CD provides that DNRC is responsible for paying 27.5% of future remedial action costs, which by definition includes "all remedial action costs incurred by any person for remedial actions approved by DEQ at the Facilities." Swank's CD contains a similar provision but sets the payment at 2%. Therefore, both CDs require the payment of commenter's future remedial action costs if those costs are incurred for actions approved by DEQ. However, DEQ did not believe it was appropriate to require DNRC or Swank to reimburse any third party, including the commenter, for its past remedial action costs for a number of reasons, including: (1) the commenter's past remedial action costs have primarily been incurred on commenter's property at the KPT facility, and DNRC and Swank have minimal liability at this specific facility; (2) most of the costs incurred by the commenter were for work not approved by DEQ; and (3) the commenter already collected over $11 million from its pursuit of the KPT Company's assets (Exhibit UU, Pages 2 and 4) and has not spent anywhere near that much addressing the facilities. Further, DEQ did not allow either DNRC or Swank to receive any credit for money either has already spent at these facilities. (Exhibit M: Please note that DNRC negotiated hard to receive credit for its past expenditures, which DEQ refused to consider.) Upon reviewing this comment, however, DEQ does recognize that there needs to be a date that defines the difference between past and future remedial action costs in the DNRC CD. Therefore, DEQ has modified the DNRC CD to address this issue and has defined "future remedial action costs" as those incurred after January 1, 2005. (No change is necessary to the Swank CD as this issue is already addressed.) DEQ is unsure what the commenter is referencing when it states that DNRC's tenants contaminated soil and groundwater on the commenter's property. The commenter owns property on the Reliance Refinery facility (Exhibit T) and DEQ believes that the commenter may have contaminated that property during the course of conducting its railroad activities. DEQ has been informed that free product/crude oil was unloaded into earthen dikes built in the barrow pits and/or beside the railroad tracks when the refinery tanks were full. (Exhibit Y, Page 2) The commenter owns the main line track areas that are contaminated, as evidenced by free product oozing out of the ground surface on the commenter's property. (Exhibit A, Page 35 "surface expressions of semi-liquid sludge occur along the east fence line"; see also Exhibit RR, a photograph of the commenter's property at the

Reliance facility showing free product visible on the ground surface.) Finally, DEQ is not aware that the commenter has taken action to investigate DNRC's property with the exception of some limited groundwater monitoring. In fact, one of the reasons DEQ finally was forced to initiate litigation at these facilities is because of the commenter's refusal to address contamination off its property boundaries.

Comment 3: Neither CD is fair nor reasonable and neither is in the public interest. (Page 2 of DNRC opposition brief; page 13 of Swank opposition brief)

Response: As described in this document, DEQ has carefully reviewed the allocation factors, applied its evaluation to DNRC and Swank, and disagrees with the commenter's evaluation. DEQ conducted its negotiations with DNRC and Swank in good faith and believes that DNRC and Swank are bearing the cost of the harm for which they are responsible. The settlement is reasonable; DEQ elected to settle using a percentage allocation after analyzing all the CECRA allocation factors. DEQ carefully weighted the strengths and weaknesses of its case against DNRC and Swank. Finally, settlement with DNRC and Swank is consistent with CECRA's goals of encouraging settlement and providing DNRC and Swank a measure of finality in exchange for their willingness to settle.

Comment 4: It is premature for this Court to issue a binding allocation of responsibility for cleanup of these three industrial properties. (Pages 2, 3 and 10 of DNRC opposition brief; Pages 2 and 11-12 of Swank opposition brief)

Response: DEQ disagrees that it is too early to settle this case with any of the defendants. CECRA encourages early settlement to avoid litigation costs and also to reach cleanup of contaminated facilities sooner. In the case at hand, DEQ has substantial amounts of information regarding the conduct and basis of liability for each party. It is true that the nature and extent of contamination has not been fully defined at these facilities; however, that is the reason DEQ elected to settle with each defendant for a proportion of liability rather than a sum certain. DEQ used its expertise and best efforts together with the available information to determine a fair and reasonable allocation to DNRC and Swank and DEQ is entitled to deference in its determinations. The commenter also states, in the Swank opposition brief, that DEQ argued it was too early to settle when DEQ defended the Klingler Lumber summary judgment motion. The commenter is comparing apples and oranges. Klingler Lumber was requesting the Court's ruling that it had a complete defense to liability. That is a much different situation than when a party is settling its liability and agreeing to accept responsibility at the facility. DEQ notes that this commenter is arguing that until the comprehensive RI/FS is complete at these facilities settlement is premature. At another CECRA facility (the S&W Sawmill), the commenter signed a Stipulated Agreement allocating it 1% of the liability before all remedial investigations were complete at that facility. (Exhibit Z signed May 2001 with the comprehensive remedial investigation report completed at the facility in October 2004 and the feasibility study as yet incomplete.) It appears the commenter appreciates early settlement if that settlement allocates a small percentage of liability to it but disapproves early settlement if the other parties receive a smaller percentage of liability than the commenter believes it will receive.

Comment 5: The record is devoid of any information about the total cost of cleanup of Reliance, including that portion owned by Swank, or DNRC's proportion of liability. (Pages 2-3 and 10 of DNRC opposition brief; Pages 2, 3, 7, 8, 11, 12 and 13 of Swank opposition brief)

Response: It is true that DEQ does not know the exact cost of the ultimate cleanup at these facilities. That is why DEQ elected to settle with DNRC and Swank based on a percentage of liability. Both DNRC and Swank approached DEQ seeking a sum certain settlement, but because the total costs of cleanup cannot be accurately estimated at this time, DEQ would not settle on those terms. As described above, the record is far from "devoid" of information about DNRC's and Swank's proportion of liability. DEQ has significant information regarding the basis for each defendant's liability as demonstrated by the administrative record supporting this responsiveness summary. DEQ has been involved in both administrative and judicial allocations/cost recovery actions and applied its expertise in determining a fair and reasonable allocation to DNRC and Swank.

Comment 6: The legislature authorized DEQ to spend up to $1.25 million to conduct an investigation into the origins, nature and extent of the contamination primarily at Reliance Refinery owned by DNRC. (Page 3 of DNRC opposition brief) (DEQ notes that BNSF's comments on the Swank CD acknowledge that Swank also owns property at the Reliance facility. (Page 2 of Swank opposition brief))

Response: It is false that SB489's grant of funding is for the Reliance Refinery. There are data gaps at all three facilities and the $1.25 million is being used to prepare a data summary report, remedial investigation, risk assessment, and feasibility study for all three facilities. (Exhibit AA "[U]p to $1.25 million may be used by [DEQ] to pay the costs incurred by [DEQ] in contracting for evaluating the extent of contamination and formulating final remediation alternatives for releases at the Kalispell pole and timber, reliance refinery company, and Yale oil corporation facility complex.") This work will determine the nature and extent of contamination from all three facilities, the risks posed by that contamination to human health and the environment, and will evaluate cleanup alternatives to assist DEQ in selecting a final remedy. DEQ does not necessarily agree that the "origins" of the contamination are the focus of the SB489 work. Finally, please note that DNRC does not own the "Reliance Refinery." The commenter, Swank, and DNRC each own portions of the Reliance facility. (Exhibits A, G, and T)

Comment 7: DNRC permitted the KPT Company to store treated wood products on the Reliance property into the 1990s. (Page 4 of DNRC opposition brief; Page 3 of Swank opposition brief)

Response: It is DEQ's understanding that DNRC leased its property to the KPT Company for the storage of poles. Whether those poles were treated is not known; however, data does not suggest a source of PCP on DNRC property. It is clear that the significant source of PCP is on the commenter's property in the areas where actual wood treating operations occurred. (Exhibit B, Page 6 "Investigations confirm that the vast majority of PCP-contaminated soils are in the area of the KP&T treating process area.…"; Exhibit B, Page 7 "The soil and ground-water quality data clearly demonstrate that KP&T operations are the sole source of PCP to soil and ground water.") The KPT Company dissolved in 1990 and no storage of poles occurred on DNRC property after that date.

Comment 8: There is evidence of a small wood treating operation on the Reliance property and disposed of wood treating chemicals on the Reliance property. (Page 4 of DNRC opposition brief; pages 3-4 of Swank opposition brief)

Response: DEQ is aware that a KPT Company employee reported a small butt dipping operation on DNRC property. (Exhibit BB) However, data does not suggest a source of PCP on DNRC property and there is no question that the vast bulk of wood treating operations, and resulting contamination, occurred on the commenter's property. (Exhibit B, Page 6 "Investigations confirm that the vast majority of PCP-contaminated soils are in the area of the KP&T treating process area.…"; Exhibit B, Page 7 "The soil and ground-water quality data clearly demonstrate that KP&T operations are the sole source of PCP to soil and ground water.")

Comment 9: To date, little or no real cleanup has occurred on the Reliance property and BNSF tends to agree that much is unknown about the Reliance site. No meaningful remediation has even been initiated by DEQ or DNRC, despite years of opportunity to do so. DEQ just recently retained a consultant primarily to investigate the scope and nature of soil and groundwater contamination on the Reliance property. In the 1990s, Exxon completed some relatively minor investigation and cleanup of soil on the Yale property. Meanwhile, BNSF has completed extensive studies of soil and groundwater at the KPT property over the past 12 years, as well as studies of groundwater contamination on the Reliance and Yale properties that may have been caused by the KPT Company's activities on the KPT property and/or the Reliance property, and BNSF's actions have removed significant contamination. (Pages 4 and 10 of DNRC opposition brief; Pages 4 and 7 of Swank opposition brief)

Response: There have been numerous remedial actions conducted at the Reliance facility. These include the following conducted as part of the Pioneer Phase I RI: the excavation of 99 test pits (91 on DNRC property including that property contained within the KPT and Reliance facilities and 8 on Swank property); installation of four new onsite monitoring wells; elevation surveying of all monitoring wells on all three facilities for groundwater flow determination; and collection of groundwater samples from seven Reliance wells, one KPT well, and one Yale well. (Exhibit A) During the Land and Water Phase II RI/FS, the following actions occurred: collection of surface soil samples from three places on DNRC property; collection of surface and subsurface soil samples from sixteen places on the Swank property; collection of groundwater samples from three monitoring wells on the Reliance facility (other wells were sampled at the same time as part of the semi-annual sampling for KPT; installation of two large-diameter wells to facilitate active free-product removal; and installation of belt-skimmers into the large-diameter wells to actively remove free-product from the groundwater. (Exhibit I)

As directed by SB489 enacted in 2005, DEQ retained a consultant to investigate the extent of soil and groundwater contamination at all three facilities, not just Reliance. (Exhibit AA) DEQ's believes it has a relatively good idea of the extent of contamination present at the Reliance facility and less of an understanding of the extent of contamination at the KPT facility. Although the commenter has conducted sampling in the area of the former treatment operation, the commenter has virtually no sampling data from other areas of the facility, especially for those areas that are not owned by the commenter. DEQ disagrees with the commenter's characterization of its investigations as "extensive studies," at least in relation to soils. The

commenter has continually refused to sample the subsurface soils as requested/required by DEQ. (Exhibits KK, LL, MM, NN, and OO) It has done sampling in the area of the former treating operation, but more for the purpose of saving money on removal of hot-spots before the land-ban on PCP went into effect. (Exhibit CC, Page 1-1 "The goal of this work was to conduct a onetime soil excavation to remove PCP hot spots in shallow soils and transport them off site for disposal in a Subtitle C facility in advance of [the May 12, 1999 land ban].") There are large portions of the KPT facility that have never been sampled, specifically those not owned by the commenter. The commenter's claim that it has been investigating soil and groundwater at the facility for the past 12 years is misleading. It is true that groundwater sampling has been ongoing since the late 1980s, but not by the commenter, who appears to be taking credit for sampling events conducted by DEQ, EPA, DNRC, and Exxon's consultants. The commenter did not begin conducting routine groundwater monitoring events until 2001, although it did conduct one event in 1999. Prior to that, there may have been an occasional sampling event, but the majority of the events before 2001 were conducted by persons other than the commenter. (Exhibit DD) For more information about how the commenter's actions have addressed contamination, see response below.

The work conducted by Exxon in the 1990s was not what DEQ would characterize as "relatively minor." Exxon excavated approximately 10,465 tons of soil and processed it through a thermal desorption unit, which was a relatively new and innovative technology at that time. (Exhibit EE) There was considerable effort and money involved in the excavation and cleanup of the soil at the Yale facility. Additionally, the source area at the Yale facility was removed, resulting in concentrations of many fractions of petroleum constituents in groundwater steadily decreasing to nearly non-detect over the years. (Exhibit FF)

Comment 10: BNSF has decommissioned former treatment tanks and associated equipment, excavated contaminated soil below the tanks, and shipped the soil off-site to a permitted soil treatment disposal facility. BNSF also designed, tested and then installed a groundwater treatment system on the KPT property and has been monitoring the progress of that system, which has been highly successful. BNSF also submitted to DEQ a draft work plan for completing the investigation and cleanup of the rest of the KPT property, but in over 3 years DEQ has yet to respond. To date, BNSF has spent more then $2 million investigating and cleaning-up soil and groundwater contamination associated with the KPT Company's activities. (Page 5 of DNRC opposition brief; pages 4-5 of Swank opposition brief)

Response: The commenter did not decommission former treatment tanks and associated equipment. The KPT Company pulled the tanks and equipment and sold them when it decommissioned the facility. (Exhibit C, Pages 4-5) In 1999, the commenter did some excavating and sampling of soils in the location of the former treatment operation to remove PCP hot-spots prior to the land-ban going into effect. (Exhibit CC, Page 1-1) The commenter excavated approximately 470 cubic yards of soil and had it disposed of at a Class C landfill which would not be allowed under today's requirements. (Exhibit CC, Page 2-8) The commenter also conducted a pilot test of a groundwater treatment system and, in April 2004, upgraded that system to a full-scale system without DEQ approval. (Exhibit GG) DEQ had no information about the upgrade until a formal request was made to the commenter to provide DEQ with information on the system. DEQ hired a third-party consultant (Dr. Greg Swanson

with Tetra Tech) to review the information submitted by the commenter. Dr. Swanson commented on the fact that the system is not designed to treat dioxin and that the commenter's consultants are injecting extremely large amounts of ozone into the subsurface to account for the dioxin. In Dr. Swanson's opinion, the results are inconclusive, rather than "highly successful," as characterized by the commenter. (Exhibit HH) Additionally, the commenter's project officer told DEQ that the results were inconclusive when DEQ met with the commenter on March 23, 2005.

The commenter has stated on numerous occasions, and in numerous ways, that it "submitted to DEQ a draft work plan for completing the investigation and cleanup of the rest of the KPT property, but in over 3 years DEQ has yet to respond." DEQ would like to put this issue to rest as the commenter's characterization of it is simply unfounded. The following is the chronology for this work plan:

- October 23, 2000: DEQ sent a letter to the commenter requiring additional investigation to identify the specific data gaps in existing data and define the investigations necessary to fill the gaps and support development of a risk assessment, including fate and transport analysis. Additionally, DEQ required that "a complete characterization of the soil at the site" be completed. (Exhibit II)
- March 15, 2001: the commenter submitted a Draft Additional Investigation Work Plan. (Exhibit JJ)
- July 13, 2001: DEQ commented on the Draft Additional Investigation Work Plan. (Exhibit KK)
- August 27, 2001: the commenter submitted the Revised Draft Additional Investigation Work Plan (Exhibit LL)
- April 1, 2002: DEQ commented on the Revised Draft Additional Investigation Work Plan and determined its comments were not adequately addressed. DEQ required the commenter to revise the document again. (Exhibit MM)
- May 17, 2002: the commenter submitted the second Revised Draft Additional Investigation Work Plan. (Exhibit NN)

After receiving the second revised document, DEQ reviewed the document and identified a number of outstanding comments from its prior review that still had not been incorporated. The following are only some examples of where the commenter failed to incorporate comments on its third submittal: the work plan did not address the KPT facility but only the commenter's property; the work plan only looked at surface soil and stated that a phase II investigation may be carried out to look at subsurface soil in response to DEQ's comments that it must include subsurface sampling as well; the work plan only intended to look for dioxin where PCP was previously found above the screening level set for the hot-spot removal; the commenter declined to use the leaching to groundwater numbers developed by DEQ or the EPA Region IX soil screening levels and instead insisted on using the commercial preliminary remediation goals; the commenter planned to use "zero" instead of half the detection limit in the case of non-detects for dioxins/furans as is required by DEQ; the commenter did not provide determinations for how decisions will be made on whether or not to carry out the phase II investigation; the commenter refused to sample in the areas where free product was previously visually identified; the commenter would not collect subsurface soil samples from 2-10 feet to evaluate the construction

worker scenario; and the commenter refused to depict the KPT facility as defined by CECRA, instead showing only the commenter's property. (Exhibit OO) Because of the commenter's failure to incorporate DEQ's comments, DEQ elected not to spend further resources providing formal comments on the document. It became obvious that the process of DEQ reviewing and providing comments was not bearing fruit so DEQ felt its resources were better spent in other areas. DEQ had already provided comments on this document on two separate occasions so the commenter is very well aware of why the document was not approved. DEQ is still waiting for its comments to be incorporated by the commenter. As a further point of clarification, the document was for investigation only, not for cleanup as stated in the commenter's objections. (Exhibit JJ, cover letter "The goal of this workplan is to provide a complete characterization of the soil to [sic] which will be used to conduct a quantified risk assessment.") It is difficult to see how the commenter could submit a plan for cleanup given that the commenter had not delineated the extent of the contamination in soils. DEQ cannot address commenter's statement that it has spent $2 million addressing the KPT facility. DEQ is not privy to the commenter's cost estimates since most of the work conducted was done without DEQ approval.

Comment 11: BNSF objects to Paragraph 20 of both CDs that provide payment by DNRC and Swank for Future Remedial Action costs incurred by other persons, for example BNSF, "shall in DEQ's sole discretion, be either reimbursed to the person who incurred those Future Remedial Action Costs or retained by the DEQ to defer additional Future Remedial Action Costs, including DEQ's own Future Remedial Act Costs, or a combination of the two. (Page 7 of DNRC opposition brief; pages 5-6 of Swank opposition brief)

Response: CECRA gives DEQ broad discretion to enter into settlement and provides that such settlement may contain whatever terms and conditions DEQ "in its discretion determines to be appropriate." Section 75-10-723, MCA. In the case at hand, the defendants have a history of paying DEQ's cost recovery invoices late or not at all. (Appendix PP) DEQ determined it was necessary to retain portions of these payments should certain contingencies arise. Examples of such contingencies include, but are not limited to, the submittal of competing claims between nonsettling defendants for the same payments being made by settling defendants; and nonpayment or underpayment of DEQ's remedial action costs and fines or assessments. Therefore, DEQ believes it is an appropriate provision in both CDs.

Comment 12: What are DEQ's total projected cleanup costs for the Reliance property, the KPT property and the Yale property? (Page 8 of DNRC opposition brief; pages 2 and 9 of Swank opposition brief)

Response: As stated above, DEQ acknowledges that it does not have complete projected costs of cleanup for the facilities. That is the reason DEQ settled based on a percentage allocation of liability, which is a fair and reasonable method for settlement.

Comment 13: Why is DNRC only paying $125,000 of DEQ's past costs? What percentage of DEQ's past costs does $125,000 represent, and why? (Page 8 of DNRC opposition brief)

Response: DEQ issues its cost recovery invoices on a quarterly basis. At the time that DEQ and DNRC began negotiating the terms of the CD (early in 2005), DEQ had information on its

oversight costs at the three facilities through December 31, 2004. The total amount incurred by DEQ at the three facilities through December 31, 2004 was $461,417.47, and 27.5% of that amount is $126,889.80. (Exhibit QQ) For simplicity, the amount DNRC was required to pay was rounded to $125,000. However, for consistency sake and to assuage the commenter's concerns, DEQ will require DNRC to pay the additional $1,889.90 in its last payment. In addition, as stated above, DEQ will clarify the definition of past and future remedial action costs to make it clear that costs incurred before January 1, 2005 are considered "past" costs and those incurred after that date are "future" costs.

Comment 14: The Land and Water study identified the need to stabilize, excavate and dispose of approximately 1,500 cubic yards of lead impacted soils. Additionally the Land and Water study indicated there would be a need to excavate and dispose of approximately 8,200 cubic yards of petroleum hydrocarbon impacted soils. As the soils have not been fully analyzed, whether such soils may be disposed of as non-hazardous waste is yet unknown. Under the DNRC CD, BNSF would be obligated to pay over $3.6 million for disposal of these soils. (72.5% of $5,087,500). Under the DNRC CD, BNSF would be required to pay $3.6 million of the Reliance's $5,087,500 soil removal costs. (Page 12 of DNRC opposition brief)

Response: CECRA applies strict, joint and several liability to all parties, including the commenter. This liability may be reduced by the amount of settlement DEQ reaches with another party. See § 75-10-719(1), MCA. Therefore, settlement is actually in the commenter's interest because its liability may be reduced from 100% to 72.5% (reduced again, of course, by Swank's settlement for 2% and further reduced by the settlement of any of the other defendants). DEQ appreciates the commenter's acknowledgement of its joint and several liability at these facilities. (The Land and Water report referenced here actually identified approximately 500 cubic yards of lead-impacted soils, rather than 1,500 stated by the commenter. Additionally, the document identified 9,200 cubic yards of petroleum-impacted soils, rather than 8,200 stated by the commenter. (Exhibit I)) Please note that the proposed excavation work was not approved by DEQ and DEQ does not assume this will be the final remedy for the Reliance facility. However, for the sake of argument, DEQ will use the commenter's numbers to analyze the DNRC settlement:

$15.35 million to cleanup KPT facility
(based on Exhibit B, the commenter's expert report prepared in another lawsuit involving the KPT facility which indicated cleanup costs would be from $9.7 million to $21.5 million. DEQ will use an average for conservative purposes.)
$5 million to cleanup the Reliance facility
(based on Exhibit I, the Land and Water study suggested by the commenter.)
$0 to cleanup the Yale facility
(to give the commenter the benefit of the doubt, assume no further cleanup at Yale.)

Total cleanup for all three facilities $20.35 million
DNRC's share (27.5%) = $5.596 million

As such, using the commenter's own figures, DNRC will pay $5.596 million in cleanup costs where under those same numbers the cleanup of the Reliance facility, the site from which most if

not all of DNRC's liability arises, will cost only $5.087 million. It appears that DNRC is actually paying more than its fair share of the overall cleanup costs assuming that DNRC received 100% of the liability for the Reliance facility. DEQ acknowledges this is a hypothetical example using the best figures currently available, but it demonstrates that the share allocated to DNRC is a fair and reasonable settlement.

Comment 15: In essence DEQ and DNRC are asking this Court for Summary Judgment on behalf of DNRC. (Page 13 of DNRC opposition brief)

Response: A summary judgment on behalf of DNRC would result in DNRC paying nothing toward final cleanup of these facilities. In fact, DNRC is accepting liability of 27.5% for all three facilities, both in payment of DEQ's oversight costs and for final cleanup. The purpose of settlement is to provide finality to a party in exchange for that party accepting a fair and reasonable share of liability that promotes CECRA's purpose and the public's interest – by ensuring protection of public health, safety and welfare and the environment. There is no question that the CD between DNRC and DEQ meets all the requirements necessary to be accepted by the Court.

Comment 16: BNSF is collecting samples from Swank's property and expects that data to provide information necessary for BNSF to defend itself and to assist the Court in determining whether the Consent Decrees are fair, reasonable, and in the public's interest. (Pages 6-7 of Swank opposition brief) DEQ has acknowledged that more sampling is needed on Swank property. (Page 10 of Swank opposition brief)

Response: DEQ has enough information regarding Swank's involvement at these facilities to determine a fair and reasonable settlement as demonstrated by DEQ's evaluation of the factors found in § 75-10-750, MCA. DEQ is well aware of the contamination on Swank's property. For example, during the Pioneer Phase I RI, eight test pits were excavated on the Swank property (on approximately 100-foot centers). There was slight surficial lead contamination (15J ppm - J means the laboratory estimated the value because the concentration is below the minimum value the lab can quantify) and petroleum hydrocarbon contamination at the water table interface with the historic tank area being more contaminated than the eastern border. In the test pits, there was no petroleum contamination at the surface. (Exhibit A) The Land & Water Phase II RI/FS indicates there is both surface and subsurface soil contamination on the Swank property. The location of the surface soil contamination (also in subsurface) was identified as the location of the diesel fuel storage tank where a spill of several thousand gallons occurred. In this area, contamination was present from surface to the extent of excavation (10-12 feet bgs). In other areas where contamination has been found (only in the subsurface), it has been confined to the smear zone. (Exhibit I) Therefore, while the commenter's sampling may help further delineate contamination, DEQ did not settle with Swank on the premise that there was no contamination on Swank property. There is no reason to delay settlement in order to wait for the commenter's data. Furthermore, if each party with whom the DEQ settles must withstand a barrage of last minute investigations from the commenter or others, that will erect an inappropriate roadblock to other defendants' willingness to settle.

Comment 17: The DNRC Consent Decree fails to address the factors set forth in § 75-10-750, MCA, the requirements of § 75-10-719, MCA, and contains no information that would allow the Court to evaluate whether the proposed allocation is fair to the other parties. (Page 9 of DNRC opposition brief)

Response: The commenter confuses the scope and purpose of the Consent Decree with the purpose and scope of the administrative record that DEQ compiles in reaching its decision to enter into a Consent Decree. The purpose and scope of the Consent Decree itself is to set forth the terms and conditions of the settlement between DEQ and the settling party. The administrative record as identified and summarized in this Responsiveness Summary provides the reasoning and rationale for the settlement, including DEQ's application of the § 75-10-750, MCA, factors, its analysis of the requirements of § 75-10-719, MCA, and the fairness of the settlement to the other liable persons.